



[6450-01-P]

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

[Case No. VHE-002]

Energy Conservation Program for Consumer Products: Decision and Order Granting a Waiver to Empire Comfort Systems from the Department of Energy Vented Home Heating Equipment Test Procedure

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Decision and Order.

SUMMARY: The U.S. Department of Energy (DOE) gives notice of its Decision and Order in Case No. VHE-002, which grants Empire Comfort Systems, Inc. (Empire) a waiver from the existing DOE test procedure for determining the energy consumption of residential vented home heating equipment. DOE previously published the Empire Petition for Waiver and solicited comments, data, and information regarding the petition, which requested permission to use the DOE test procedure proposed in the Notice of Proposed Rulemaking (NPR) for Direct Heating Equipment and Pool Heaters published in the Federal Register on October 24, 2013, as an alternate test procedure to account for the energy consumption of its condensing-type direct heating equipment (DHE) models. Under this Decision and Order, Empire shall be required to

test and rate its condensing-type direct DHE models using the applicable provisions of the DOE test procedure final rule for DHE published in the Federal Register on January 6, 2015. Empire shall use those provisions as an alternate test procedure until July 6, 2015, the mandatory compliance date for the amended test procedure, at which point this waiver shall terminate.

DATES: This Decision and Order is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. The waiver granted in this Decision and Order shall terminate on July 6, 2015.

FOR FURTHER INFORMATION CONTACT: Mr. Bryan Berringer, U.S. Department of Energy, Building Technologies Office, Mailstop EE-5B, 1000 Independence Avenue, SW., Washington, DC 20585-0121. Telephone: (202) 586-0371. E-mail: Bryan.Berringer@ee.doe.gov.

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SUPPLEMENTARY INFORMATION: In accordance with 10 CFR 430.27(l), DOE gives notice of the issuance of its Decision and Order as set forth below. The Decision and Order grants Empire's request for waiver from the existing residential vented home heating equipment test procedure in 10 CFR part 430, subpart B, appendix O for its PVS (18,35)(K)(N)(P) basic model of condensing-type direct heating equipment, provided that Empire tests and rates such

products using the alternate test procedure described in this notice. This Decision and Order prohibits Empire from making representations concerning the energy efficiency of these products unless the product has been tested consistent with the provisions of the alternate test procedure set forth below, and the representations fairly disclose the test results. Distributors, retailers, and private labelers are held to the same standard when making representations regarding the energy efficiency of these products. (42 U.S.C. 6293(c)) This waiver shall terminate on July 6, 2015, the mandatory compliance date for the amended DOE DHE test procedure (the source of the alternate test procedure).

Issued in Washington, DC, on March 20, 2015.

Kathleen B. Hogan,
Deputy Assistant Secretary for Energy Efficiency,
Energy Efficiency and Renewable Energy.

Decision and Order

In the Matter of: Empire Comfort Systems Inc. (Empire) (Case No. VHE-002).

I. Background and Authority

Title III, Part B¹ of the Energy Policy and Conservation Act of 1975 (EPCA), Public Law 94-163 (42 U.S.C. 6291-6309, as codified), sets forth a variety of provisions concerning energy efficiency and established the “Energy Conservation Program for Consumer Products Other Than Automobiles.” This program covers most major household appliances, including the vented home heating equipment that is the subject of this notice.² Part B includes definitions, test procedures, labeling provisions, energy conservation standards, and the authority to require information and reports from manufacturers. Further, Part B authorizes the Secretary of Energy to prescribe test procedures that are reasonably designed to produce results that measure energy efficiency, energy use, or estimated operating costs, and that are not unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)) The test procedure for residential vented home heating equipment is contained in 10 CFR part 430, subpart B, appendix O, Uniform Test Method for Measuring the Energy Consumption of Vented Home Heating Equipment.

The regulations set forth in 10 CFR 430.27, which were recently amended, contain provisions that enable a person to petition DOE to obtain a waiver from the test procedure requirements for covered products. See 79 FR 26591 (May 9, 2014) (revising 10 CFR 430.27, effective June 9, 2014). (DOE notes that while the previous version of 10 CFR 430.27 was

¹ For editorial reasons, on codification in the U.S. Code, Part B was re-designated Part A.

² All references to EPCA in this document refer to the statute as amended through the American Energy Manufacturing Technical Corrections Act (AEMTCA), Public Law 112-210 (Dec. 18, 2012).

effective at the time of Empire’s submission, the substantive aspects of this regulation have not been changed by the May 9, 2014 final rule.) A person may petition for a waiver from the test procedure requirements that would ordinarily apply to a particular basic model covered under DOE’s regulations when: (1) the petitioner’s basic model for which the petition for waiver was submitted contains one or more design characteristics that prevent testing according to the prescribed test procedure, or (2) when prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy and/or water consumption characteristics as to provide materially inaccurate comparative data. 10 CFR 430.27(a)(1) (noting that a person may petition to waive for a particular basic model any requirements of 10 CFR 430.23 or of “any appendix” under 10 CFR part 430, subpart B). Petitioners must include in their petition any alternate test procedures known to the petitioner to evaluate the basic model in a manner representative of its energy consumption characteristics. 10 CFR 430.27(b)(1)(iii).

DOE may grant a waiver subject to conditions, including adherence to alternate test procedures. 10 CFR 430.27(f)(2). Waivers remain in effect pursuant to the provisions of 10 CFR 430.27(h).

Any interested person who has submitted a Petition for Waiver may also file an Application for Interim Waiver from the applicable test procedure requirements. 10 CFR 430.27(b)(2). DOE will grant an interim waiver request if it is determined that the applicant will experience economic hardship if the interim waiver is denied, if it appears likely that the petition for waiver will be granted, and/or DOE determines that it would be desirable for public policy

reasons to grant immediate relief pending a determination on the petition for waiver. 10 CFR 430.27(e)(2).

II. Empire's Petition for Waiver: Assertions and Determinations

On January 20, 2014, Empire filed a Petition for Waiver and Application for Interim Waiver for a condensing-type direct heating equipment model from the test procedure applicable to vented home heating equipment set forth in 10 CFR part 430, subpart B, appendix O.³ See 79 FR 18536 (April 2, 2014). In its petition, Empire seeks a waiver from the existing DOE test procedure for its vented gas heaters and fireplace systems under 10 CFR part 430 because Empire asserts that the existing test procedure does not account for condensing-type heating equipment. Empire seeks to use the test method proposed by DOE in a NOPR for Direct Heating Equipment and Pool Heaters published in the Federal Register on October 24, 2013 (78 FR 63410) (hereinafter the "October 2013 NOPR"), as an alternate test procedure to account for the energy consumption of its condensing-type DHE models. That notice, in relevant part, defines the term "condensing vented heater" and provides a method for testing these devices.

³ On July 21, 2011, Empire originally filed a petition for waiver from the DOE test procedure for residential vented home heating equipment for specified condensing-type direct heating equipment models applicable to its Mantis vented gas fireplace systems. The current DOE test procedure in appendix O has no provisions for testing condensing-type direct heating equipment. On November 3, 2011, DOE published the Empire petition for waiver (Case No. VHE-001) from the vented home heating equipment test procedure in the Federal Register (76 FR 68180). The notice provided for the submission of comments by December 5, 2011. Because all known manufacturers of domestically-marketed units of the same product type were not timely notified that DOE published the Petition for Waiver, DOE determined that re-opening of the public comment period was appropriate. On February 1, 2012, DOE published a notice of re-opening of the public comment period in the Federal Register (77 FR 5001) with the comment period ending on March 2, 2012. DOE received no comments during the initial petition for waiver comment period nor during the re-opening of the public comment period. In the January 20, 2014 request, Empire stated that the list of models in the original waiver submitted to DOE on July 21, 2011 is no longer accurate and is superseded by its latter petition. Thus, DOE has withdrawn the petition under Case No. VHE-001.

DOE notes that of the eight basic model numbers set forth in Empire's petition, only one (PVS (18, 35) (K)(N)(P)) qualifies as a covered DHE product. The remaining seven basic models (which are fireplaces, fireplace inserts, or stoves) are hearth products and are, therefore, subject to neither the test procedure requirements of 10 CFR part 430, subpart B, appendix O nor the proposed requirements of the October 2013 NOPR.⁴ Therefore, DOE has considered only one of the basic models submitted in the petition for waiver. For the remaining basic models, since testing of hearth products is not required under DOE regulations at this time, there is no need to consider a waiver for such models. However, if Empire chooses to conduct testing to make representations regarding the energy efficiency of these products, the company is free to use any test procedure it deems appropriate.

Empire also requested an interim waiver from the existing DOE test procedure, which DOE granted. See 79 FR 18536, 18537 (April 2, 2014). An interim waiver may be granted if it appears likely that the Petition for Waiver will be granted and/or DOE determines that it would be desirable for public policy reasons to grant immediate relief pending a determination of the petition for waiver. See 10 CFR 430.27(e)(2). DOE determined that Empire's Application for Interim Waiver did not provide sufficient market, equipment price, shipments, and other manufacturer impact information to permit DOE to evaluate the economic hardship Empire might experience absent a favorable determination on its Application for Interim Waiver. DOE understands, however, that absent an interim waiver, the basic model submitted by Empire that

⁴ On February 8, 2013, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) issued a decision vacating the DOE definition of "Vented hearth heater" at 10 CFR 430.2, and remanded the issue to DOE to interpret the challenged provisions consistent with the court's opinion. Hearth, Patio & Barbecue Association v. U.S. Department of Energy, 706 F.3d 499, 509 (D.C. Cir. 2013). Since that time, DOE has published a proposed coverage determination that would classify all hearth products as a new covered product pursuant to 42 U.S.C. 6292(a)(20) and (b). 78 FR 79638 (Dec. 31, 2013).

qualifies as a covered product could not be tested and rated for energy consumption on a basis representative of its true energy consumption characteristics. It is in the public interest to have similar products tested and rated for energy consumption on a comparable basis, where possible. Furthermore, DOE determined that Empire is likely to succeed on the merits of its Petition for Waiver and that it is desirable for public policy reasons to grant immediate relief. Empire requested to use the test method proposed by DOE in the October 2013 NOPR as an alternate test procedure to account for the energy consumption of its condensing-type direct heating equipment models; that notice, in relevant part, defines the term “condensing vented heater” and provides a method for testing these devices, thereby providing a suitable vehicle for testing these products and making representations as to their energy efficiency. For the reasons stated above, DOE granted Empire’s Application for Interim Waiver from testing of its condensing-type vented gas heater system. 79 FR 18536, 18537-38 (April 2, 2014).

DOE did not receive any comments on the Empire petition published in the Federal Register on April 2, 2014 (79 FR 18536).

Under this Decision and Order, Empire shall be required to test and rate its condensing-type direct heating equipment (DHE) models using the DOE Final Rule test procedure for DHE published in the Federal Register on January 6, 2015 (80 FR 792). The effective date of this rule was February 5, 2015 and compliance will be mandatory starting July 6, 2015. DOE feels that the use of the Final Rule test procedure will utilize the most up-to-date test method and be able to compare similar products to help inform the consumer when purchasing these types of products.

III. Consultations with Other Agencies

DOE consulted with the Federal Trade Commission (FTC) staff concerning the Empire petition for waiver. The FTC staff did not have any objections to granting a waiver to Empire.

IV. Conclusion

After careful consideration of all the material that was submitted by Empire and consultation with the FTC staff, it is ordered that:

(1) The Petition for Waiver submitted by the Empire Comfort Systems, Inc. (Case No. VHE-002) is hereby granted as set forth in the paragraphs below.

(2) Empire shall be required to test and rate the following basic model (condensing vented heater):

PVS (18,35) (K)(N)(P)

according to the alternate test procedure set forth in paragraph (3) below.

(3) Empire shall not be required to test the products listed in paragraph (2) above according to the test procedure for residential vented home heating equipment set forth in 10 CFR part 430, subpart B, appendix O, but instead shall use as the amended test procedure as set forth in the final rule published in the Federal Register on January 6, 2015 (80 FR 792).

(4) Representations. Empire may make representations about the energy use of its condensing-type DHE models for compliance, marketing, or other purposes only to the extent that such products have been tested in accordance with the provisions outlined above and such

representations fairly disclose the results of such testing.

(5) This waiver shall terminate on July 6, 2015, consistent with the provisions of 10 CFR 430.27(h)(2).

(6) This waiver is issued on the condition that the statements, representations, and documentary materials provided by the petitioner are valid. DOE may revoke or modify this waiver at any time if it determines the factual basis underlying the Petition for Waiver is incorrect, or the results from the alternate test procedure are unrepresentative of the basic model's true energy consumption characteristics.

(7) This waiver is granted for only those models specifically set out in Empire's January 20, 2014 Petition for Waiver, not future models that may be manufactured by Empire. Empire may submit a new or amended Petition for Waiver and Application for Grant of Interim Waiver, as appropriate, for additional residential vented home heating equipment models for which it seeks a waiver from the DOE test procedure. Grant of this waiver also does not release Empire from the certification requirements set forth at 10 CFR part 429.

Issued in Washington, DC, on March 20, 2015

Kathleen B. Hogan
Deputy Assistant Secretary for Energy Efficiency
Energy Efficiency and Renewable Energy

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